Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
TELEPHONE COMPANY-	)	
CABLE TELEVISION	)	CC Docket No. 87-266
Cross-Ownership Rules,	)	
Sections 63.54 - 63.58	)	

To: The Commission

REPLY COMMENTS OF THE UNITED STATES CONFERENCE OF MAYORS; THE NATIONAL ASSOCIATION OF COUNTIES; THE CITY OF ALEXANDRIA, VIRGINIA; THE ALLIANCE FOR COMMUNICATIONS DEMOCRACY; ANNE ARUNDEL COUNTY, MARYLAND; THE CITY OF BALTIMORE, MARYLAND; BALTIMORE COUNTY, MARYLAND; THE CITY OF DALLAS, TEXAS; HOWARD COUNTY, MARYLAND; THE CITY OF INDIANAPOLIS, INDIANA; THE CITY OF LOS ANGELES, CALIFORNIA; MANATEE COUNTY, FLORIDA; MONTGOMERY COUNTY, MARYLAND; PRINCE GEORGE'S COUNTY, MARYLAND; AND THE CITY OF SANTA CLARA, CALIFORNIA, ON THE FOURTH FURTHER NOTICE OF PROPOSED RULEMAKING

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SUMMARY

Fair Competition Promotes Fair Compensation. The initial comments in this proceeding overwhelmingly support the principle that self-programming video dialtone operators are subject to Title VI. Far from impeding competition, subjecting such operators to Title VI is the only way to produce fair competition in the video delivery market. Local communities, not the LECs, are the ones seeking to equalize competitive opportunities, by applying the same fair principles and reasonable requirements to all competitors. These requirements include franchise fees and public, educational, and governmental ("PEG") access requirements, which are nothing more than forms of compensation for use of public property. Fair competition must respect those property rights.

Title VI Applies to Self-Programming Video Dialtone Operators. Almost every commenter except the LECs agrees that under Title VI, every self-programming video dialtone carrier operates a "cable system" and must obtain a local franchise. The Commission has no authority to change this statutory mandate. Congress cannot have intended common carriage by itself to exempt LECs from the definition, because the definition of "cable operator" specifically includes common carriers to the extent that their facilities are used to transmit video programming directly to subscribers. LECs may not evade that requirement merely by creating a programming affiliate.

LECs attempt to substitute for the statutory standard their own conditions, claiming that the "cable system" definition applies only to "conventional cable service," or only when the operator has total control over all programming on the system, or only where the carrier possesses a monopoly. Nothing in the statute, however, supports these interpretations.

The LECs' arguments are also inconsistent with their position, the Commission's position, and the rationale of the Court of Appeals in NCTA. A LEC's involvement in program selection, through an affiliate or otherwise, makes a video dialtone system a cable system under the Cable Act.

Some LECs suggest that they already have authorizations allowing them to use the public rights-of-way for video dialtone. But any current authorizations the LECs may have do not extend to such use. The Cable Act makes clear that a cable franchise is distinct from any other kind of authorization. Nor, for that matter, is it even clear that all LECs currently have valid authorizations to use the public rights-of-way for telephone service, much less for video delivery.

Three LECs appear to suggest that franchising of a self-programming video dialtone operator is per se unconstitutional. These arguments, however, ignore court decisions upholding such franchise requirements, and in any event, the Commission may not declare Title VI unconstitutional. Others argue that the division of headend facilities between carrier and programmers in a pure video dialtone system prevents the LEC from being a cable

operator. This argument fails on two counts: a self-programming video dialtone operator by definition has its own programming facilities connected to the common carrier platform; and in any event, the headends of many cable operators today are connected by wireline to programmer feeds, yet no one seriously contends these systems are not cable systems.

Finally, LECs' reliance on 47 U.S.C. § 541(c) is misplaced. That section merely makes clear that providing cable service is not by itself grounds for common carrier regulation.

Title VI May Consistently Be Applied. LECs argue that applying Title VI to a self-programming video dialtone operator would be either inconsistent or redundant with common carriage. To the extent they are correct, it is the Commission's video dialtone rules, not the statute, that must bend. But the LECs have greatly exaggerated the difficulties of applying Title VI to self-programming video dialtone.

Title II does not address the same concerns as Title VI. Only Title VI provides a framework for meeting local community needs and interests. Nor are merely voluntary efforts by the LECs to meet these local needs and interests sufficient. Local communities must be able to negotiate reliable and enforceable commitments from the system operators serving their citizens.

Some LECs argue that their role as common carriers somehow precludes them from abiding by any Title VI requirements that involve control over programming. But this argument is flatly inconsistent with the LECs' companion claim that they are now

free to provide their own programming over these same common carrier systems, whether or not through an affiliate.

Many LECs complain that meeting both Title II and Title VI requirements would be unduly burdensome. Yet those LECs that currently provide cable service under the rural exemption are already subject to both Title II and Title VI. Moreover, if two sorts of requirements overlap, then meeting the higher of the two standards imposes no new burden on the operator, since meeting the higher standard also satisfies the less stringent one.

To the extent that LECs wish to have the benefits of both roles -- common carrier and facilities-based video programming provider -- they cannot legitimately complain if they are required to bear the burdens Congress assigned to both, particularly as long as they also have the option, as the Coalition believes they should, of choosing the pure cable route.

Fair Competition Requires Further Conditions. Several LECs argue that the Commission cannot require them to obtain § 214 approval to build or operate video dialtone systems. But § 214 applies to video dialtone just as to other construction by LECs. Moreover, if the Commission were to conclude (contrary to the statute) that Title VI did not require a self-programming video dialtone operator to obtain a local franchise, the § 214 process would be the only opportunity local communities would have to address their needs and interests.

The Commission has authority to regulate LECs' acquisitions of cable systems. Because telco-cable acquisitions in the same

geographic market would tend to erode competition rather than promote it, and hence would do little or nothing to achieve the Commission's professed procompetitive goals for video dialtone, a lenient policy on buyouts would be inadvisable.

Both LECs and cable operators claim that cable companies should also be permitted to provide video carriage on a common carrier basis under the video dialtone rules. That would be possible, however, only if cable companies became pure common carriers exercising no control whatsoever, through an affiliate or otherwise, over the programming carried on their systems -- a highly unlikely occurrence. As with existing LECs, cable companies would remain cable operators as long as they continued to program <u>any part</u> of their own systems. Moreover, if the Commission were to allow cable operators to renege on their existing franchise contract obligations in this manner, that would be a taking of local franchising authorities' property rights, requiring the federal government to pay just compensation to the franchising authorities.

Fair competition may be achieved only by making all competitors subject to the same set of rules. Since the Commission is not at liberty to excuse cable operators from their obligations under Title VI, the <u>only</u> way in which the Commission can create a truly level playing field is to make clear that the same Title VI requirements apply to both traditional cable operators and self-programming video dialtone operators.

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To: The Commission

The City of Alexandria, Virginia; the Alliance for Communications Democracy; Anne Arundel County, Maryland; the City Of Baltimore, Maryland; Baltimore County, Maryland; the City of Dallas, Texas; Howard County, Maryland; the City of Indianapolis, Indiana; the City of Los Angeles, California; Manatee County, Florida; Montgomery County, Maryland; Prince George's County, Maryland; the City of Santa Clara, California; the United States Conference of Mayors; and the National Association of Counties (collectively, the "Local Community Coalition" or "Coalition"), by their attorneys, hereby file the following reply comments in response to the Fourth Further Notice of Proposed Rulemaking

("Fourth FNPRM") in the above-captioned proceeding, released January 20, 1995.

I. INITIAL COMMENTS SUPPORT THE PRINCIPLE THAT FAIR COMPETITION PROMOTES FAIR COMPENSATION FOR USE OF THE PUBLIC RIGHTS-OF-WAY.

The Fourth FNPRM asks whether Title VI (the Cable Act) applies to a self-programming video dialtone operator.[1] As the Coalition has already pointed out, this issue is not simply a matter of regulatory policy, but of protecting local governments' property rights in the public rights-of-way.[2]

The initial comments filed in this proceeding overwhelmingly support the principle that self-programming video dialtone operators are subject to Title VI, and that, far from impeding competition, subjecting them to Title VI is the only way to produce fair competition in the video delivery market. Standing alone against this principle are the local exchange telephone companies ("LECs"), who not surprisingly seek a competitive advantage over their traditional cable operator competitors by claiming exemption from Title VI. But such an exemption would constitute an anticompetitive subsidy awarded by the Commission to LECs at the expense of local governments and their taxpaying

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[1] Fourth Further Notice of Proposed Rulemaking ("Fourth FNPRM") in the above-captioned proceeding, released January 20, 1995, at ¶ 14.

[2] Comments of the Coalition at 15-28 (March 21, 1995) ("Coalition Comments").

residents.[3] Not only does statutory law forbid the Commission to grant such a subsidy; in addition, it would be anticompetitive.

To no one's surprise, all of the commenters claim to support competition in principle. The question (subject to the statutory dictates of Title VI) is: which policies would be pro-competitive in effect? The LECs argue that applying Title VI to a self-programming video dialtone operator would impose a competitive disadvantage, claiming that they seek only a level playing field.[4] But the LECs suffer from competitive vertigo. They never explain how it would be inequitable to subject self-programming video dialtone operators to the same regulatory requirements of Title VI that apply to their admitted competitors, traditional cable operators. Local communities, not the LECs, are the ones seeking to equalize competitive opportunities, by applying the same fair principles and reasonable requirements to all competitors.[5]

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[3]As pointed out in Coalition Comments at 10-12, 17-20, permitting LECs to use public rights-of-way for free, while other video carriers must pay fair value for the use of public resources to transmit their signals, would reduce the LECs' costs of doing business, and thus covertly subsidize the LECs' video systems, at local communities' expense.

[4]See, e.g., Comments of BellSouth Corporation at 6-7, 25-26 (March 21, 1995) ("BellSouth Comments"); Comments of the Pacific Telesis Group, Pacific Bell and Nevada Bell at 8 (March 21, 1995) ("Pacific Telesis Comments"); Comments, U S West Communications, Inc., at 19 (March 21, 1995) ("U S West Comments").

[5]See, e.g., Comments of United Video at 2 (March 21, 1995) ("United Video Comments"); Comments of the Greater Metro Cable Consortium at 7, 11 (March 20, 1995) (recommending "regulatory parity" between cable operators and self-programming video dialtone operators).

To the extent the LECs complain that excessive regulation of any sort will adversely affect competition,[6] they miss the point. In most respects, what the LECs call "regulation" is actually simply compensation for use of local rights-of-way. Thus, franchise fees and public, educational, and governmental ("PEG") access requirements are really nothing more than forms of compensation for use of public property. Fair competition must respect those property rights. As for other forms of more classic regulation -- primarily rate regulation -- Title VI is flexible; it requires rate regulation, for example, to disappear if and when true competition develops,[7] but the obligations to pay franchise fees and provide PEG access remain unaltered.

Thus, in their zeal to tilt the playing field, LECs overlook the fact that the Cable Act already recognizes the critical distinction between regulation and compensation. They ignore that cable rate regulation may be terminated at once when effective competition appears. Franchise fees and PEG access obligations, on the other hand, are part of the compensation the community receives for the use of its property, and hence may be negotiated by franchising authorities regardless of whether competition exists.[8] In fact, the Commission's Chairman has

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[6] See, e.g., Comments of Bell Atlantic at 6-7 (March 21, 1995) ("Bell Atlantic Comments").

[7] See 47 U.S.C. § 543(a)(1)-(2).

[8] In many states, LECs are promoting an excise tax on video programmers as a watered-down substitute for franchise fees. See, e.g., Comments of GTE at 35 (March 21, 1995). While state and local governments may generally impose such a tax, it is not

recognized in the analogous context of spectrum auctions that requiring compensation for the use of public resources is not only just in a competitive environment, but actually enhances competitive and efficient use of such resources.[9]

As the Coalition has pointed out, local communities welcome the prospect of level competition from the LECs in the cable service market, now that the collapse of the telco-cable cross-ownership ban has made such head-to-head competition possible.[10] Indeed, some commenters quite properly wonder whether the video dialtone construct is necessary at all to promote competition,

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a substitute for franchise fees. Indeed, an excise tax on video programmers, if applied in place of a Cable Act franchise fee, would create a competitive imbalance, because a Cable Act franchise fee may be applied to all gross revenues derived from the operation of the system, including carriage as well as programming revenues. See 47 U.S.C. § 542(b). Moreover, a consistent excise tax on video programming would apply to programming provided by traditional cable operators and other video carriers, such as DBS, as well as video dialtone systems, and hence would not equalize the systems' obligations, since cable operators would have to pay both a franchise fee and the excise tax. Finally, LECs' excise tax gambit reflects, and fosters, a fundamental confusion between taxation, on the one hand, and rental for use and occupation of the public rights-of-way, on the other. A franchise fee is not a tax, but rent for using public rights-of-way. See note 61 infra.

[9]See Chairman Reed Hundt, Address to the Wertheim-Schroder/Variety Conference at 4, 8 (April 4, 1995) ("The PCS auctions give us the right policy paradigms for the digital future. . . . Instead of saying why auctions, we should always say why not auctions").

[10]See, e.g., Coalition Comments at 5-9; Comments of the Greater Metro Cable Consortium at 7 (March 21, 1995); Michigan Communities' Initial Comments at 50-51 (March 20, 1995) ("Michigan Communities' Comments"); Comments of the National Association of Telecommunications Officers and Advisors and the National League of Cities at 28-32 (March 21, 1995) ("NATOA Comments"); Comments of the Virginia Municipal League at 1 (March 21, 1995).

now that LECs can become cable operators directly. As one of the Bell companies bluntly put it, "The plain fact is that the video dialtone ('VDT') scenario created by this Commission in 1992 has been rendered obsolete . . . ."[11]

Even before the fall of the telco-cable ban, the LECs' video dialtone proposals generally sought to drag the video dialtone model closer to traditional cable -- for example, by establishing anchor programmer arrangements. Many of the initial commenters recognize that the actual LEC proposals evoked by the Commission's video dialtone scheme are little more than glorified cable systems, seeking to do exactly what cable does while avoiding cable's statutory obligations under Title VI.[12] Since the removal of the statutory barrier, this process has accelerated. Indeed, many LEC commenters attack even the vestigial common carrier obligation of providing capacity for multiple programmers, as if confident that in the end they will be the only program providers on their systems.[13] At the same

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[11]Initial Comments of Southwestern Bell Corporation at 2 (March 21, 1995) ("SBC Comments"). Similar sentiments are echoed in the Comments of Duncan, Weinberg, Miller & Pembroke, P.C., at 5-6 (March 21, 1995) ("Duncan Comments"), and Comments of Cox Enterprises, Inc., at 7-13 (March 21, 1995) ("Cox Comments").

[12]See, e.g., Michigan Communities' Comments at 10; Duncan Comments at 6; Comments of the City of Springfield, Missouri, at 1 (March 20, 1995); Cox Comments at 3-4.

[13]Thus, many of the LEC commenters oppose limits on the capacity that may be used by the video dialtone operator's own programming affiliate. This opposition appears to rest on the LECs' assumption that in all likelihood, any capacity not used by the video dialtone operator will not be used at all. See, e.g., Bell Atlantic Comments at 11-14; GTE Comments at 40; Comments of NYNEX at 16 (March 21, 1995) ("NYNEX Comments"); SBC Comments at

time, the LECs also continue to argue that in many cases they cannot compete with cable operators unless they can, in effect, be cable operators.[14] But these LEC arguments serve merely to confirm the Coalition's position that it would be patently inequitable and anticompetitive for the Commission to attempt to excuse a self-programming video dialtone operator from its responsibilities under Title VI.

II. TITLE VI REQUIRES TELEPHONE COMPANIES THAT PROVIDE VIDEO PROGRAMMING, LIKE OTHER CABLE OPERATORS, TO OBTAIN A LOCAL FRANCHISE.

A. Virtually All Commenters Other Than LECs Agree That Self-Programming Video Dialtone Operators Are Subject to the Franchising Requirements of the Cable Act.

In their initial comments, the LECs seem unable to grasp why having their own affiliates as programmers should make a difference in the franchise-free status the Commission awarded to a pure video dialtone operator.[15] This puzzlement could readily be cured by reading the statute. A common carrier's system becomes a "cable system" precisely when it "is used in the

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31-32; Comments of the United States Telephone Association at 24 (March 21, 1995) ("USTA Comments"). See also Letter of Raymond W. Smith, Chairman of Bell Atlantic Corporation, to Chairman Hundt, dated March 7, 1995, at 4.

[14] See, e.g., Bell Atlantic Comments at 8; BellSouth Comments at 22-25; GTE Comments at 21 n.17; SBC Comments at 7-8; U S West Comments at 31; USTA Comments at 12.

[15] Thus, for example, both the SBC Comments at 17 and the GTE Comments at 24 and 33 refer with apparent puzzlement to the notion that they might "magically" become cable operators once they begin to program their own systems.

transmission of video programming directly to subscribers."[16] By definition, a self-programming video dialtone operator transmits video programming directly to subscribers. Thus, under Title VI, every self-programming video dialtone carrier operates a "cable system" and must obtain a local franchise. In this way, Title VI wisely prevents some competitors from gaining an unfair competitive advantage over others by evading their responsibility to meet local needs and interests.[17] Almost every commenter except the LECs agrees on this clear legal conclusion.[18]

The statutory mandate is so clear that the LECs' attempts to fend it off are unusually threadbare. Thus, for example, Bell Atlantic cites the NCTA decision for the proposition that the exception to the common carrier exemption in the Title VI "cable system" definition "does not apply to common carrier services like video dial tone."[19] But Bell Atlantic curiously avoids quoting the actual language of the passage in NCTA that it cites, which states that the exception " . . . does not apply to video dialtone service because it does not involve the local telephone

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[16]47 U.S.C. § 522(7)(C).

[17]Coalition Comments at 39-57.

[18]Out of 75 commenters, only two commenters other than the LECs assert that Title VI is not applicable to a self-programming video dialtone system. One is Viacom, which is currently exiting the cable business and has an obvious interest in finding well-funded buyers among the LECs. The other is METS Fans United et al., whose interest is unclear, but whose positions seem curiously similar to Bell Atlantic's.

[19]Bell Atlantic Comments at 19 & n.46.

company in providing video programming directly to subscribers."[20] Since Bell Atlantic is, of course, proposing to provide video programming directly to subscribers, its claim that NCTA supports its position is disingenuous at best.[21]

The Commission has no authority to change this statutory mandate.[22] Nor can the LECs confront it openly and still maintain that the Cable Act does not apply to a self-programming video dialtone operator. Rather, in their initial comments the LECs seek to restate Title VI as they wish it had been written -- either with the bald assertion that common carriage alone excuses them from Title VI, or with more involved evasions. However, the Commission must enforce the law as Congress enacted it, not as the LECs (or the Commission) might prefer.

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[20] National Cable Television Association v. FCC, 33 F.3d 66 at 73-74 (D.C. Cir. 1994) ("NCTA") (emphasis added).

[21] Similarly, USTA makes a Freudian slip when it characterizes the telco-cable cross-ownership ban (which forbade LECs "to provide video programming directly to subscribers") as a "prohibition on telephone company provision of cable television service," USTA Comments at 1 (emphasis added). The statement thus concedes that provision of video programming directly to subscribers is "cable television service." Shortly afterwards, USTA states that LECs providing cable service are subject to the Cable Act. USTA Comments at 11.

[22] See Comments of the National Cable Television Association, Inc., at 6 (March 21, 1995) ("NCTA Comments") (quoting Southwestern Bell Corp. v. FCC, 43 F.3d 1515, 1519 (D.C. Cir. 1995)); Comments of Continental Cablevision et al. at 24 (March 21, 1995) ("Continental Comments").

B. Contrary to the LECs' Assertions, Title VI States That Self-Programming Common Carriers Are Cable Operators.

The language of Title VI plainly includes self-programming common carriers' facilities in the definition of "cable system." In arguing to the contrary, LECs almost universally rely on the "common carrier" exemption, which excludes from the definition of "cable system":

> (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter, except that such facility shall be considered a cable system (other than for purposes of section 541(c) of this title) to the extent such facility is used in the transmission of video programming directly to subscribers; . . .[23]

As the common carrier exemption itself makes clear, if the LEC or an affiliate provides any programming on a video dialtone system, that system becomes a facility of a common carrier used in the transmission of video programming directly to subscribers. Accordingly, the common carrier exemption (C) does not apply to such a system. It is the provision of video programming directly to subscribers that makes the difference between a pure video dialtone operator, which has been held not to be subject to the Cable Act, and a self-programming video dialtone operator, which is a cable operator.

Rather than confronting the clear statutory language of exemption (C), LECs seek to substitute some other criterion for self-programming in order to remain within the protection of exemption (C). Most commonly, the LECs argue that simply because

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[23] 47 U.S.C. § 522(7)(C) (emphasis added).

they are common carriers, they are exempted from the "cable operator" definition even when self-programming. Thus, for example, Southwestern Bell simply ignores half of the statutory language of § 522(7)(C) and baldly asserts that "Title VI regulation cannot apply to a VDT operator because Title VI by its terms cannot apply to a common carrier arrangement."[24] But, by its terms, Title VI does apply to common carriers in certain circumstances: where they provide their own programming.[25] Congress could not have intended common carriage by itself to exempt LECs from the definition, because the definition of "cable operator" specifically includes common carriers to the extent that their facilities are used to transmit video programming directly to subscribers.

C. The LECs' Attempts To Substitute Their Own Criteria For Exemption From Title VI Are Unsupported.

Given the thinness of the claim that a self-programming video dialtone system is not a cable system in the face of the exception to exemption (C), the LECs also suggest more elaborate substitute criteria to narrow the scope of that exception. For example, at least one LEC suggests that merely working through an affiliate prevents the LEC from providing programming directly to subscribers.[26] As the Coalition pointed out in its initial

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[24]SBC Comments at 14. See also Pacific Telesis Comments at 4-8; U S West Comments at 28-29; USTA Comments at 19.

[25]47 U.S.C. § 522(7)(C).

[26]NYNEX Comments at 7.

comments, however, such a claim ignores the language and the logic of Title VI, which cuts through affiliate relationships, both in the definition of "cable operator" and in the telco-cable cross-ownership provision.[27]

Other LECs seek to import additional conditions into the exception in exemption (C), so that the exception will not apply to them. For example, U S West suggests that the "cable system" definition applies only to something called "conventional cable service," quoting the NCTA court's summary of the Commission's argument.[28] However, this phrase occurs in the NCTA decision immediately following the explanation that the exception does not apply because the LEC does not provide video programming directly to subscribers. It is the provision of such programming, in other words, that the NCTA court viewed as constituting "conventional cable service." The exception to the common carrier exemption applies whenever the LEC provides video programming directly to subscribers, without further restrictions, and there is nothing in the statutory language that would allow a self-programming video dialtone operator to escape the charge of providing "conventional cable service" in this sense. Indeed, the only logical way to construe the statute is that a self-programming video dialtone operator is on a par with

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[27]Coalition Comments at 44-46. See 47 U.S.C. §§ 522(5) and 533(b).

[28]U S West Comments at 28 n.70, quoting NCTA at 73-74. See also Ameritech's Initial Comments at 15 (March 21, 1995) ("Ameritech Comments"); Bell Atlantic Comments at 17.

a LEC providing cable service under the rural exemption: each provides video programming directly to subscribers over its own network.

The LECs also argue that Title VI applies only when the operator has total control over all programming on the system.[29] This, however, is simply the common carriage criterion in different garb: a common carrier in principle cannot have total control of all programming. Again, however, there is nothing in the statute that would suggest the exception to the common carrier exemption applies only where the operator controls all programming. On the contrary, under this interpretation even a conventional cable operator would be excused from compliance with Title VI, since the leased access and PEG access requirements of Title VI prevent even ordinary cable companies from having complete control of the programming on their systems. Thus, there are no grounds for importing a "unified control" criterion into the exception to § 522(7)(C).

At least one LEC appears to argue that Cable Act safeguards should be applied only where the carrier possesses a monopoly.[30] But this is mere wishful thinking, contradicted by the Act. The "cable system" definition contains no reference to monopoly. On the contrary, the Cable Act specifically indicates where its

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[29]See, e.g., Ameritech Comments at 15; Bell Atlantic Comments at 17-18; BellSouth Comments at 28-30; Pacific Telesis Comments at 5 & n.10; SBC Comments at 16; USTA Comments at 20-21.

[30]See Comments of Rochester Telephone Corp. at 7 (March 3, 1995).

provisions do depend on the presence of monopoly power, as with rate regulation.[31] And the Act also specifically prohibits exclusive franchises.[32] At no point, however, does the Act suggest that Title VI as a whole would fail to apply where a cable system faces competition.

In several cases, LECs argue that because video dialtone did not exist in 1984, Title VI could not have been meant to apply to video dialtone.[33] However, while it is true that the term "video dialtone" had not yet been coined when the 1984 Cable Act was passed, there was nothing in the law at the time that would have prevented a LEC -- or anyone else -- from offering video common carriage. Thus, Congress could certainly have contemplated such carriage in crafting the scope of the exception in subsection (C). Indeed, the paragraph (C) exception makes sense only if Congress did contemplate the possibility that a telephone common carrier might provide video programming directly to subscribers. And Congress was certainly sufficiently aware of the possibility that it went out of its way to prohibit states and local franchising authorities from requiring cable operators to offer video capacity on a common carrier basis.[34]

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[31]See 47 U.S.C. § 543(a)(2).

[32]47 U.S.C. § 541(a)(1).

[33]See, e.g., Ameritech Comments at 11-12; Bell Atlantic Comments at 17; USTA Comments at 20)

[34]See 47 U.S.C. § 541(c). Similarly, while the telco-cable cross-ownership prohibition is now largely unenforceable, its language demonstrates that Congress was aware of the possibility that a common carrier might seek to use an affiliate to provide

It is also noteworthy that in the 1992 Cable Act, Congress made no change in the language of the exception to the common carrier exemption, even though Congress was certainly aware of video dialtone at the time, since the 1992 Act was passed almost a year after the FCC proclaimed the video dialtone concept in November, 1991.[35] Thus, it appears that Congress intended the statute to mean exactly what it says -- that a common carrier's system becomes a cable system when it is used to provide video programming directly to subscribers.

The LECs are now seeking to do exactly what cable operators do: provide video programming directly to subscribers over their own systems. Hence, it is perfectly reasonable to conclude that the Act holds them to the same Title VI standards as other cable operators.

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video programming directly to subscribers, and that Congress saw such a device as indistinguishable from a cable system. "Subsection 613(b)(2) bars common carriers from providing . . . channels of communications, to any entity that it owns or controls, if these facilities are to be used for, or in connection with, such provision of video programming [directly to subscribers]". H.R. Rep. No. 934, 98th Cong., 2d Sess. at 56 (1984), reprinted in 1984 U.S.C.C.A.N. 4655, 4693 ("House Report"). The critical difference between channel service, which Section 613(b) permitted, and cable service, which Section 613(b) forbade, is self-programming, the same distinction drawn by the court in NCTA.

[35]In fact, the bill currently pending before the U.S. Senate, S. 652, contains an elaborate provision specifying that the Cable Act does not apply where a carrier provides a "video platform." See S. 652, 104th Cong., 1st Sess. at sec. 203(a), amending 47 U.S.C. § 533(b)(1). Congress thus seems to recognize that if self-programming video dialtone operators are to be exempted from Title VI, the current statute must be changed. (It is, of course, beyond the Commission's authority to make such a change in the statute, even if the Commission approves of the proposed change in S. 652.)

D. The Telephone Companies' New Arguments Flatly Contradict What They, and the Commission, Argued Before the Court of Appeals.

As the Coalition has pointed out, the LECs' arguments are inconsistent with the Commission's original grounds for holding that Title VI did not require a pure video dialtone operator to obtain a local franchise, and with the decision of the Court of Appeals upholding the Commission.[36] Thus, if the Commission were to accept LEC attempts to extend that exemption to self-programming video dialtone operators, both the Commission and the LECs themselves would need to contradict their own earlier arguments to the Court of Appeals in order to defend that position.

In defending its earlier video dialtone franchising decisions before the D.C. Circuit, the Commission argued to the court:

> the LEC providing video dialtone does not engage in the "transmission" of video programming, because it is precluded from selecting or providing the video programming to be transmitted over its facilities.[37]

In other words, the Commission asserted that it is the exclusion of the pure video dialtone operator from programming that allows

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[36] See Coalition Comments at 46-50. At least one LEC acknowledges that the Commission relied in its analysis on the fact that the video dialtone operator did no programming, and that the Court of Appeals accepted the Commission's argument on those terms. See BellSouth Comments at 26. Cf. U S West Comments at 2, 27 ("The Commission approached LEC provision of video dialtone simply as a transmission service, divorced entirely from any expressive activity by a LEC").

[37] Brief for Respondents at 30, NCTA, 33 F.3d 66 (emphasis added).

such an operator to escape the franchise requirements of Title VI. If such an operator becomes involved (either itself or through an affiliate) in providing programming, it will no longer be excused from those franchise requirements.

The Commission's argument that pure video dialtone was not subject to the franchise requirement of Title VI depended at every point on the assumption that the LEC would not be involved in providing or selecting programming. Thus, the Commission argued that "[a]n essential element of common carriage is an obligation to provide service 'to all people indifferently,' . . . without exercising control over the content of the transmissions."[38] A facility, including headend equipment, is a "cable system" only to the extent that it includes the transmission of video programming directly to subscribers, and "transmission" depends upon active participation in the selection and distribution of video programming.[39] "The exception to the common carrier exemption is not applicable here because video dialtone facilities would not be used by the LEC to provide video programming directly to subscribers."[40] "Congress limited the status of cable operator to those persons that themselves provide video programming."[41]

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[38]Id. at 25 (citation omitted; emphasis added).

[39]Id. at 38 n.35, 29.

[40]Id. at 40 (emphasis in original).

[41]Id. at 41. See also id. at 21 ("LECs providing video dialtone cannot determine the composition of the video programming that is transmitted over their facilities and